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No. 01-521

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IN THE

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

KELLY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United State Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2, the Republican National Committee ("RNC") seeks leave to file a brief amicus curiae in support of the petition for certiorari. Counsel for Petitioners have given consent. Counsel for amicus attempted to obtain consent from counsel for Respondents by letter. These letters have not been returned

Believing that the brief itself fully establishes that a national political party is uniquely positioned to bring the court's attention to the nationwide implications of measures such as that in place in Minnesota, and the disparate impact those measures have on the equal protection of the national parties in the political process, the Republican National Committee respectfully requests that this Court grant leave for filing of the brief.

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BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE[1]

Amicus Curiae Republican National Committee ("RNC") is a national political party committee. The RNC is an unincorporated association that serves as the governing organization for the national political party. The RNC supports the candidates, issues, and principles of party. From endorsing candidates, to supporting candidates and party organizations, to organizing meetings and forums on various political, legal and policy issues, to sponsoring voter registration, education and turnout programs, the RNC is involved in a wide range of party-building activities.

The RNC promotes candidates in all fifty states for a myriad of state and local offices from the statehouse to the courthouse. The RNC is directly affected by any restriction, such as the Minnesota judicial canon, that prohibits candidates from seeking, accepting, or using political party endorsements, from attending or speaking at political gatherings, and from discussing contested legal and political issues. Simply put, the canons at issue severely limit the ability of the RNC to engage in the kind of political speech and association that it routinely promotes in other states, including fostering candidate debates and issues forums, and endorsing candidates for public office.

Although the canons at issue are directed at the candidates and not the parties themselves, this is a distinction

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae* and their members, made any monetary contribution to the preparation or submission of this brief.

without a difference. In races for elected office, the public is virtually always informed of a party's endorsement from the candidate – in the form of campaign leaflets, letters, television and radio advertisements, and speeches in which the candidate identifies himself with a political party. In addition, the total prohibition on a judicial candidate attending any function sponsored by a political party – no matter what its nature – directly impairs the party's ability to associate with like-minded candidates and promote the party's views on matters of public policy. As such, it is the party's speech as much as the candidate's that is harmed when a candidate's speech is silenced.

Because of the direct impact Minnesota's judicial canons have on the speech and associational rights of political parties, and because of the RNC's experience in supporting candidates for judicial office across the nation, Amicus is uniquely positioned to assist this Court in understanding the issues presented by the petition for certiorari.

SUMMARY OF ARGUMENT

In *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989), this Court affirmed the profound constitutional significance of political speech in the form of political party endorsements and involvement in campaigns for public office. Almost immediately following the Court's decision in *Eu*, however, those who firmly believe in stifling this form of speech sought to limit the holding of *Eu* to its narrowest possible sense – namely that the First Amendment prohibits a state from preventing a political party from endorsing candidates, but only in connection with *partisan* primary elections. The year following *Eu*, this Court granted certiorari in a case involving non-partisan elections. In *Renne* v. *Geary*, 501 U.S. 312 (1991), this Court reviewed a Ninth Circuit decision addressing the First Amendment concerns

raised by a California constitutional provision prohibiting political parties from endorsing candidates for nonpartisan office. Unfortunately, the Court discovered that the *Renne* case was a poor vehicle to address this important issue, and elected to dispose of the case on justifiability grounds. *Renne*, 501 U.S. at 320-24. This case presents the first good opportunity since *Renne* for this Court to address squarely the issue of whether political parties have less free speech rights in the context of nonpartisan rather than partisan elections.

The court below held that Minnesota had a compelling interest in promoting public confidence in the impartiality of its judiciary, that the judicial canons at issue served that interest, and that they were narrowly tailored to address the state's interest. In so doing, the court below opened a gulf in strict scrutiny analysis. Strict scrutiny ought require, as most courts have recognized, that the state's need for restrictions on speech be substantiated by record evidence, not simply philosophical musings. The need to preserve judicial impartiality was invoked as a mantra by the court below to justify its restrictions, but this claim is unsupported by the record. Strict scrutiny also ought require, as most courts have recognized, that the least restrictive means for addressing the state's need be adopted. The court below ignored many obvious less restrictive means for addressing the state's concern of maintaining the appearance of judicial impartiality and, as a result, applied strict scrutiny in a manner that was analytically indistinguishable from rational basis review. This Court should grant certiorari to clarify the appropriate application of strict scrutiny in this area, before other courts follow the Eighth Circuit's lead, and fundamental First Amendment speech and association rights are placed in jeopardy.

The rule announced by the court below is at once too narrow and too broad. It is too broad because it restricts far more speech by candidates and like-minded political

organizations than is necessary to preserve the appearance of judicial impartiality. Yet, at the same time, the interest in preserving the appearance of an impartial judiciary ought logically also extend to a candidate's seeking, accepting, or using endorsements made by special interest groups, other office-seekers, labor unions, local clubs, and even newspapers. Where fundamental rights of free speech, protected by strict scrutiny, are inhibited, the failure of the court below to bridge these logical gaps ought be fatal.

This Court has already recognized that the issue of whether a state may shackle the speech of a political party that wishes to speak in connection with an election for a "nonpartisan" office is one of "fundamental and far-reaching import." *Renne*, 501 U.S. at 324. The First Amendment safeguards our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). It assures an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. U.S.*, 354 U.S. 476, 484 (1957). Thus, the First Amendment "has its fullest and most urgent application" to campaign-related speech, *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971), because "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) (per curiam). Minnesota's efforts to "protect" the electorate from awareness of the endorsements of political parties is not only a path fraught with peril, but in the last analysis reduces to the type of paternalism that was squarely rejected by the Court in *Eu*. These restrictions contradict the very principle behind having elections – that the electorate be able to make an informed choice between contenders for office by knowing more, rather than less, about the candidates.

The limitations placed by Minnesota on the ability of candidates to attend and speak at political gatherings, the prohibition from announcing views on contested political and legal issues, and the prohibition against seeking and accepting party endorsements, directly restrict the ability of political parties to get their messages out before the general public and to keep the electorate informed. While many view any rule which keeps politics away from the judiciary as a good rule, this Court has never embraced such a rigid approach. Absent any showing of a compelling need to silence the speech of candidates – and none has been shown by the respondant – this Court should grant certiorai and reverse the decision of the court below, thus preserving the right of candidates and political parties to freely speak out and associate in connection with elections for judicial office.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE IMPORTANT SPLIT BETWEEN THE CIRCUIT COURTS OF APPEALS REGARDING THE CONSTITUTIONALITY OF ENDORSEMENT AND OTHER SPEECH BANS IN THE CONTEXT OF ELECTED OFFICES, AND THE OBVIOUS TENSION BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION IN *EU*.

When this Court granted certiorari to address the constitutionality of endorsement bans on candidates for judicial office ten years ago, there was not a deep split between the lower courts as to whether these types of bans were constitutional. The lower courts had uniformly held that such bans violated free speech. In *Abrams* v. *Reno*, 649 F.2d 342 (5th Cir. 1978), the Fifth Circuit invalidated a ban on political party endorsements in primary elections. In so doing, the court affirmed (without feeling the need for extended

commentary) the district court finding that "a substantial burden on First Amendment rights is presented" by the ban, which it determined constituted a "direct prior restraint on the exercise of free speech, the right to endorse or oppose; in sum, in the important right of free political expression." *Abrams* v. *Reno*, 452 F. Supp. 1166, 1169-70 (S.D. Fla. 1978). Indeed, the court went on to explain that such "legislative restrictions on advocacy of . . . candidates are wholly at odds with the guarantees of the First Amendment." *Id.* at 1170 (*quoting Buckley*, 424 U.S. at 1). In a single sentence, the court dismissed Florida's claim that it had a compelling interest in "preserving 'official neutrality' of party executive committees in primary elections." *Id.* In short, the court barely entertained the notion that "silence coerced by law, the argument of force in its worst form" should be given preeminence over "free political speech." *Id.* at 1171.

In another case from the Fifth Circuit, the district court invalidated a ban on political party endorsements in judicial races. *See Concerned Democrats* v. *Reno*, 458 F. Supp. 60 (S.D. Fla. 1978). In *Concerned Democrats*, the court granted a preliminary injunction to plaintiffs seeking to have the ban on endorsements overturned, stressing that "[t]he court believes that conduct which involves scrutinizing and endorsing of political candidates is within the core of the First Amendment." *Id.* at 64. The court seemed strongly influenced by the fact that "[e]ven though some state regulations of the election process are permissible and necessary, the Supreme Court has not hesitated to strike down election laws which interfere with a newspaper's right to comment on political candidates," and believed the analogy to political party activity was compelling. *Id.* Thus, the Fifth Circuit was largely uniform in invalidating bans of party endorsements of candidates.

Against this legal backdrop, and this Court's decision in *Eu* striking down a California law barring pre-primary

endorsements by political parties, the Ninth Circuit rendered its decision in *Renne*. In *Renne*, the Ninth Circuit struck down provisions prohibiting political parties from endorsing candidates for nonpartisan office on the grounds that they neither served a compelling state interest, nor were narrowly tailored to serving that goal. *Renne* v. *Geary*, 880 F.2d 1062 (9th Cir. 1990), *vacated and remanded on other grounds*, 501 U.S. 312 (1991)). Noting this Court's rejection in *Eu* of endorsement bans as paternalistic and offensive to democracy, the Ninth Circuit rejected the state's attempt to draw a distinction between elections for partisan and nonpartisan offices, explaining:

> [W]e observe . . . that there is nothing in this court's *Eu* opinion or the Supreme Court's affirmance of that opinion which suggests that either analysis was in any way dependent upon the fact that partisan offices were at issue. The concern in both fora was with the State's abridgement of the rights of political parties and their members to exchange ideas and information, not with the nature of the elections at issue.

Id. at 285. The Ninth Circuit also found that the provision was fatally flawed because it was not narrowly tailored, explaining:

> The State claims that [the endorsement ban] is narrowly drawn because only political parties and their county central committees are prohibited from endorsing, supporting, or opposing nonpartisan candidates; individuals are not subject to its restrictions. But as we have noted . . . political parties as well as party adherents possess rights of expression and association under the first amendment, and the

> mere fact that [the ban] targets the collective rather than the individual voices of party members does not suffice to render it "precisely drawn."

Id. In other words, the value of political speech did not, in the Ninth Circuit's opinion, depend upon whether its *source was an association or an individual.* In addition, obvious less restrictive means for regulating the activity existed, including limits on the partisan activity of candidates for nonpartisan office that did not interfere with the ability of political parties to endorse the candidate. *See id.*

The Ninth Circuit's *en banc* decision, though in step with that of her sister circuit, was not without controversy. One spirited dissent urged that the state had a "super" compelling interest in being able to determine the structure of its own government, and because it was possible that the state might provide a limiting construction of the ban, that possibility would render it narrowly tailored. *See id.* at 286, 304 (Rymer, J., dissenting). A second dissent urged that the majority was ignoring the "devastating impact that party endorsement can have on the integrity of local office holders and on the independence of its judiciary." *Id.* at 305 (Alarcon, J., dissenting). Against this background of spirited disagreement between the lower court judges, this Court's decision to grant certiorari in *Renne* to review this nationally important decision, even prior to the development of a deep Circuit split, was no doubt seen as a welcome relief. With the issue left unaddressed in *Renne*, however, the groundwork was laid for the Eighth Circuit's decision in the instant case.

The decision of the court below, upholding a ban on candidates seeking, accepting, or using party endorsements, creates a deep split among the circuit courts of appeal over the constitutionality of attempts to limit a party's ability to endorse

and otherwise support candidates for nonpartisan offices. The court below rejected the approaches of the Fifth and Ninth Circuits, which found such bans served no legitimate compelling state interest and were not narrowly tailored. By contrast, the Eighth Circuit here found that the state had "shown compelling government interests" in "an independent and impartial judiciary" and in "preserving public confidence in that independence and impartiality." *Republican Party of Minnesota* v. *Kelly*, 247 F.3d 854, 867 (8th Cir. 2001). This is precisely the reasoning expressly rejected by the Ninth Circuit in *Renne*. The court here relied solely on newspaper editorials, affidavits from certain judges and politicians,[2] and "common sense," rather than substantive evidence, to determine that the restrictions at issue protected the state's interest. *Id.* at 871 (internal quotation omitted).

In finding that the endorsement ban was the least restrictive means of protecting this interest, the court below rejected less restrictive means of limiting the partisan activities of candidates, such as allowing the candidate to announce party affiliation only in response to a direct question, as is done in Kentucky, or allowing the candidate to discuss endorsements but not party affiliation, as is done by other states. *See id.* at 873. In so doing, the court also opened up a split with the Fifth Circuit cases, which held that these alternative means of protecting the states' interest sufficed.

The court below attempted to reconcile its decision with those of the Fifth Circuit by explaining that while the endorsement ban in the Fifth Circuit was one directed at political (or "third") parties, Minnesota's restriction was directed only at the candidate. This is a distinction without a

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2 The affiants broadly contended that they believed if the code were changed "judges would be under pressure to decide cases in ways that would impress the judge's supporters favorably, and eventually, partisanship would damage the public's confidence in the judiciary." *Id.* at 871.

constitutional difference. A party's right to endorse a candidate as a matter of free speech is meaningless if no one is aware of that endorsement or if the candidate is banned from choosing to associate with his or her political party. While dedicated party activists may be made aware of a political party's endorsement of a certain candidate from the party itself, the vast majority of voters and potential voters learn of a party's endorsement of a candidate directly from the candidate. The political party, in a very real sense, bespeaks its endorsement through the candidate. That symbiotic relationship has been explained:

> Our constitutional tradition is one in which political parties and their candidates make common cause in the exercise of political speech, which is subject to First Amendment protection. There is a practical identity of interests between parties and their candidates during an election.

California Democratic Party v. Jones, 530 U.S. 567, 589 (2000) (Kennedy, J. concurring). Consequently, as a factual matter, a ban on the seeking, acceptance, or use of a party endorsement by a candidate is tantamount to a ban on endorsements by the party itself. This Court has already struck down such bans in *Eu*.

Furthermore, even if Minnesota's restrictions directed at the candidate did not severely impair the ability of political parties to communicate their candidate endorsements to rank-and-file voters, this Court has always recognized that candidates for public office themselves enjoy the same speech and associational rights enjoyed by political parties:

> The candidate, no less than any other person, has a First Amendment right to engage in the

> discussion of public issues and vigorously and tirelessly to advocate his own election . . . . Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

Buckley, 424 U.S. at 52-53. If the importance of a candidate's rights to engage in advocacy during a campaign are of "particular importance," then a state's efforts to direct an endorsement ban at a candidate rather than a political party cannot be the very means by which the ban becomes constitutional.

In addition, the lower court's attempt to distinguish the decisions of other circuits simply cannot withstand scrutiny. Regardless of whether the endorsement ban is directed at political parties or the candidates themselves, it equally infringes on the rights of listeners. The First Amendment serves to protect the rights of listeners just as it does speakers. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). As the dissent in the court below noted, "a state may not hamstring voters seeking to inform themselves about the candidates and the campaign issues" because "it is simply not the function of government to select which issues are worth discussing or debating," and any attempt by a state to "enhanc[e] the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with . . . skepticism." *Republican Party of Minnesota*, 247 F.3d at 893 (Beam, J., dissenting) (internal quotations omitted). As this Court explained in *Tashjian* v. *Republican Party of Connecticut*, party labels and endorsements "provide a shorthand designation of the views of [the] candidates on matters of public concern," and therefore

they "play[] a role in the process by which voters inform themselves for the exercise of the franchise." 479 U.S. 208, 220 (1986). From the perspective of the rights of the listener, there is no difference between a ban on party endorsements directed at a candidate and one directed at a political party.

This split created by the Eighth Circuit extends beyond the context of endorsement bans to the very application of strict scrutiny itself. The dissent below took strong issue with the majority's test for determining whether Minnesota's canon was "necessary" to advance a compelling state interest. Under the dissent's view, the regulation at issue was fatally flawed because it was underinclusive – while prohibiting candidates from using political parties endorsements and attending party functions, it did not prevent the candidate from being endorsed by special interest groups or "consorting with organizations such as the National Organization of Women, the NAACP, the Christian Coalition, the National Association of Manufacturers, the AFL-CIO or the NRA." *See Republican Party of Minnesota*, 247 F.3d at 893 (Beam, J., dissenting) (noting that an appearance of partiality could be created by such contacts as easily as by one involving a political party). In addition, less restrictive means were available to protect the state's interest, such as the use of retention elections, public financing of judicial campaigns, lengthening judicial terms, or even providing generous pensions to alleviate financial pressure on judges. *See id.* at 902. For most courts, the existence of these less restrictive means would have led them, in their application of strict scrutiny, to strike down the provision.

The court below, however, found that the restrictions could be "narrowly tailored" within the meaning of strict scrutiny, notwithstanding these less restrictive alternatives, simply because the court claimed that (1) the Minnesota ban was "similar" to measures adopted by other states, and (2) "the authority of *Letter Carriers* and the other cases in which courts

have held it was proper to limit partisan political activity of executive employees." *Id.* at 873 (majority opinion). By ignoring the existence of less restrictive alternatives simply because they were "similar" to the prohibitions before it, the court split with the many decisions from other circuits that have invalidated state restrictions on this type of speech when less restrictive means exist. *See, e.g., S.O.C.* v. *Clark*, 152 F.3d 1136, 1147 (9th Cir. 1998) (county ordinance preventing all off-premises canvassing in City cannot stand where prohibition targeted at "problem areas" would have sufficed to protect the state's interest in aethestic streets); *Louisiana Debating and Literary Asso.* v. *City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995).[3] The Court should grant certiorari in this case to reinforce the application of strict scrutiny before other courts follow suit and erode fundamental First Amendment rights.

II. THIS CASE RAISES IMPORTANT ISSUES OF EQUAL PROTECTION

While the First Amendment concerns posed by this case are of paramount importance, this Court should also grant certiorari to address important issues raised by petitioner's Equal Protection challenge. When the court below virtually ignored petitioner's Equal Protection claim, it created serious tension with this Court's decision in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 121 S.Ct. 2351 (2001) ("*Colorado II*"), which reinforced that political parties may not constitutionally be

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3 The lower court's reliance on *Letter Carriers* is also unpersuasive. This Court in *Buckley* rejected the argument that an interest in having impartial office holders can justify a ban on endorsements in partisan elections. In *Buckley*, the government argued that *Letter Carriers* provided a sound basis for upholding a federal restriction on independent campaign expenditures during candidate elections. The Court held that the government's reliance on *Letter Carriers* was "mistaken[]," because *Letter Carriers* had specifically preserved the right of persons to express their opinions publicly during candidate elections. *See Buckley*, 424 U.S. at 48 n.54.

discriminated against in relation to other participants in the political process. *See Colorado II*, 121 S.Ct. at 2360. Absent further clarification from this Court, the precedent set by the decision below opens the door to state and local governments to place a wide range of limitations on the activities of political parties. This disfavored treatment is inconsistent with the history and development of democracy in America, which has shown that the activities of political parties should not be viewed with particular suspicion, especially in relation to other participants in the political arena.

While Canon 5 permits candidates to freely consort with politically active organizations such as the NRA, NAACP, the Minnesota Trial lawyers Association, labor unions, the Christian Coalition, and the like, it forbids judicial candidates from attending or speaking at political party gatherings or seeking, accepting, or using the endorsement of such groups. In upholding Canon 5, the court below ignored the recent statements from this Court that political parties may not be unfairly singled out for disfavored treatment. All nine Justices made clear in *Colorado II* that Congress may not place political parties in a disfavored position *vis a vis* other participants in the political process. In fact, it was the reality that individuals and special interest groups actively participate in politics in a manner indistinguishable from political parties that led the majority of the Court to uphold the coordinated spending limits that were at issue in that case. As Justice Souter explained, there is "no reason to see...[political party activities] as more likely to serve or be seen as instruments of corruption than [activities] by anyone else." *Colorado II*, 121 S.Ct. at 2352. The Court continued, "A party is not . . . in a unique position. It is in the same position as some individuals and PACs, as to whom coordinated spending limits have already been held valid . . . . " *Id. at 2356.*

Other courts have recognized that the Constitution requires political parties to be accorded the same free speech rights as other politically-active organizations, absent a compelling cause for differential treatment. In *Republican*

Party of Minnesota v. *Pauly*, 1999 WL 731003 (D. Minn. 1999), the court explained why according full free speech protection to a political party was essential for the development of democracy:

> A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees. We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction.

1999 WL 731033 at **6. If the court of appeals below discovered a compelling interest rooted in a special danger of corruption posed by political parties but not other groups, it kept that interest well hidden. The court of appeals decision is wholly at odds with this Court's ruling in *Colorado II* and creates serious equal protection concerns. On this basis alone, this Court should grant certiorari.

III. THE ISSUES PRESENTED BY THIS CASE ARE OF NATIONAL IMPORTANCE AND ARE WORTHY OF THIS COURT'S ATTENTION

The decision of the court below poses a direct threat to the free discourse of political and legal ideas and requires immediate attention from this Court in order to preserve the

ordered nature of our democracy. The circuit split, as well as the spirited dissents in *Renne* and the instant case, demonstrate poignantly the absence of a consistent approach for dealing with free speech challenges to measures designed (at least ostensibly) to preserve the independence of nonpartisan offices. The confusion over this issue is not limited to the federal Courts of Appeals. In the years following *Renne*, states have adopted a wide variety of different measures designed to limit the free flow of information in the context of judicial elections. *See, e.g., Renne*, 247 F.3d at 873 n.18. Florida has placed limits on judicial candidates meeting at political gatherings. Fla. Code of Jud. Conduct Canon 7(c)(3). Other states have adopted more limited restrictions on the candidate's use of a party affiliation or endorsement. *See, e.g.*, Ky Sup.Ct.R. 4.300, Canon 5(A)(2), S.D. Code of Jud. Conduct Canon 5(C)(1)(a)(ii). The decision below is far from being an isolated fact intensive ruling. The number of states that have imposed these restrictions in one form or another renders this case of national importance. Absent this Court's intervention, states may be tempted to adopt even more speech-restrictive measures in the future.

The ban at issue in this case is extremely broad. It prevents candidates not only from accepting or using party endorsements, but also from attending or speaking at party sponsored events, no matter what their nature. The party cannot host a debate or other forum for the electorate so that the voters can determine for themselves the difference between the candidates' judicial philosophies, cannot provide a venue for the candidate to express his or her own views, cannot even so much as introduce a candidate at a function so the voters can learn what the candidate looks like.[4] Simultaneously, the

[4] Many political parties routinely hold issue forums where candidates and elected public officials come together and discuss their views on matters of public policy. Minnesota's canon would bar any judicial candidate from attending such a forum, no matter how the forum was structured or what was discussed. On this basis alone the Court should grant certiorari to review the extraordinary constitutional concerns that are implicated here.

ban does nothing to prevent special interest groups such as abortion and anti-abortion activists from doing precisely what political parties are barred from doing, which raises serious equal protection and overbreadth concerns.

If free speech jurisprudence has one fundamental tenet, it is this: the free flow of information is always preferred over measures designed to prevent voters from learning information "for their own good." *See, e.g., Eu*, 489 U.S. at 223-24 (finding it "particularly egregious where the State censors the political speech a party shares with its members."). The preferred remedy to disfavored speech is, and always has been, counter-speech, not wholesale suppression. In leaping forward to suppress all candidate and party speech which it considers to be dangerous, Minnesota has opened the door to greater evils than those it sought to prevent.

The state of Minnesota can protect its judiciary from the appearance of undue political influence by simply making judgeships appointed offices. However, having decided to elect judges, Minnesota cannot constitutionally limit the rights of candidates, like-minded organizations, political parties, and voters to discuss the issues of concern relating to the judicial offices the candidates seek. Moreover, Minnesota cannot single out one group such as a political party whose speech it disfavors and prevent judicial candidates from referring to that group's views.

CONCLUSION

When this Court failed to address the "fundamental and far-reaching" free speech issues raised by bans on party endorsements in *Renne*, this Court explained, "we cannot decide the case based upon the amorphous and ill-defined factual record presented to us." 501 U.S. at 324. Before the Court today is the same issue, squarely presented and with a

complete record. For this reason and for the reasons set out above, Amicus Curiae respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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